IN THE

SUPREME COURT OF THE UNITED STATES

1973 TERM

NO.

CLIFFORD HERRING,

Appellant,

-against-

NEW YORK.

JURISDICTIONAL STATEMENT

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Of Counsel

IN THE

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JURISDICTIONAL STATEMENT

TO: THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES.

Clifford Herring, appellant herein, respectfully appeals from a judgment of the Appellate Division of the Supreme Court of New York, Second Department, entered December 24, 1973, affirming a judgment of the Supreme Court, Richmond County, rendered on June 15, 1972, convicting him of attempted robbery in the third degree and sentencing him to an indeterminate term of imprisonment with a maximum of four years. Appellant submits this statement to show that this Court has jurisdiction of this appeal and that a substantial question is presented.

CITATION TO OPINION BELOW

The affirmance by the Appellate Division, Second Department was without opinion and is not yet officially reported. The order of affirmance is annexed as Appendix A. On March 22, 1974, the Appellate Division amended its remittitur to certify that a constitutional question had been passed upon. The order amending the remittitur is annexed as Appendix B. Leave to appeal to the

New York Court of Appeals was denied on January 31, 1974, by Associate Judge Harold Stevens. A copy of the certificate denying leave to appeal to the Court of Appeals is annexed as Appendix C.

JURISDICTION

The judgment and order of the Appellate Division was entered on December 24, 1973. Leave to appeal to the Court of Appeals was denied on January 31, 1974.

A notice of appeal to this Court was filed on April 8, 1974. This Court's appellate jurisdiction is invoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether Section 320.20(3)(c) of the New York Criminal Procedure Law which authorizes a trial judge to prohibit defense counsel from delivering a summation in a non-jury trial is, on its face and as applied, violative of the Fifth, Sixth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments V, VI, XIV.

STATUTES INVOLVED

New York Criminal Procedure Law, Section 320.20(3): Non-jury trial; nature and conduct thereof.

* * *

3. The order of the trial must be as follows:

(a) The court may in its discretion permit the parties to deliver opening addresses. If the court grants such permission to one party it must grant it to the other also. If both parties deliver opening addresses, the people's address must be delivered first.

(b) The order in which evidence must or may be offered by the respective parties is the same as that applicable to a jury trial of an indictment as prescribed in subdivisions five, six and seven of section 260.30.

(c) The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first.

(d) The court must then consider the case and render a verdict.

STATEMENT OF THE CASE

Charged with attempted robbery in the first and third degrees and possession of a dangerous instrument,[1] appellant waived his right to a jury trial pursuant to Section 320.10 of the New York Criminal Procedure Law and on February 3, 4 and 7, 1972, was tried before a justice of the New York Supreme Court.

The People's Case

According to the complaining witness, Allen Braxton, on September 15, 1972 at about 5:30 p.m., he was outside his home, a housing project on Staten Island, transferring some money from his pants pocket to his wallet when appellant approached him. Appellant, whom he recognized from the neighborhood, said in a soft voice, "[p]lease give me some money, I am sick". When Braxton refused, appellant took a knife-blade out of his right pocket and flicked his right wrist at Braxton, whereupon Braxton ran into his building. The entire encounter lasted approximately thirty seconds.

Braxton immediately reported the incident to William Stubbs, a family friend and New York City Housing Authority Policeman.[2] Over an hour later, appellant was arrested. A search revealed a small knife-blade.[3] Appellant immediately informed Stubbs and Braxton that he had been working for a Mr. Taylor at the time they claimed he had robbed Braxton.

The Defense

According to appellant's employer, Donald Taylor, the president of A&A Tank Cleaning Company on Staten Island, on September 15, 1972, appellant was at work at 6:00 p.m.. Although unable to swear to the exact time he had seen appellant on his premises that day, Taylor did

1. New York Penal Law §§110.00/160.10; 110.00/160.05; 265.05.

2. Stubbs was the only other prosecution witness.

3. At the end of the People's case, the court dismissed the charge of possession of a dangerous instrument on the grounds that the blade was too small to come within the purview of the statute.

remember seeing him there at about 5:30 or 6:00 p.m. as well as later than 6:00 p.m.. He also remembered talking to appellant sometime during the evening and before he left for home at about 9:00 or 9:30 p.m.. Less than an hour later, appellant called him at home and said he had been arrested.

Appellant also took the stand and denied attempting to rob Braxton. He had been at work until at least 6:30 p.m. and he also pointed out that the shop was some ten minutes away from Braxton's home. Appellant further testified that at one time he had lived next door to Braxton and knew that the latter had been on drugs.[4] Indeed, on occasion Braxton had asked him for money for wine or drugs and when appellant had refused, Braxton had threatened to "fix" him.

The Verdict

After both sides had rested and a motion to dismiss the remaining two charges was denied, defense counsel requested an opportunity to make a closing argument, stating: "Well, can I be heard somewhat on the facts?" The court, relying specifically on the statute involved herein denied his request, replying: "Under the new statute, summation is discretionary, and I choose not to hear summation."

Eight minutes later, the court found appellant guilty of attempted robbery in the third degree. On June 15, 1972, appellant was sentenced to an indeterminate term of imprisonment with a maximum of four years.

The Appellate Division, Second Department affirmed the conviction without opinion on December 24, 1973. Leave to appeal to the Court of Appeals was denied on January 31, 1974.

THE QUESTION PRESENTED IS SUBSTANTIAL

I.

This case presents the serious question of whether the court in a non-[illegible]al can prohibit counsel from performing one of the most basic functions of an advocate, that of arguing his client's cause

4. Both appellant and Braxton admitted that they had used narcotics.

upon the facts elicited at trial. As the result of New York's newly enacted provision authorizing such a prohibition, the court precluded a summation in this case and thereby violated appellant's right to the effective assistance of counsel as well as his due process right to be heard on the evidence.

The impact of the Appellate Division's decision upholding the validity of Section 320.20(3)(c) is of broad constitutional concern. Not only is it contrary to the weight of authority in those jurisdictions which have concluded that the right of a defendant in a non-jury trial to have a summation delivered on his behalf is guaranteed by the Sixth Amendment, but it also disregards a fundamental tenet of our jurisprudence--that closing argument is basic to the concept of advocacy within our adversary system.

Historically, the right of a defendant to have his attorney deliver a closing argument has developed primarily as a fundamental component of the right to counsel. This development well preceded both the advent and constitutional sanctioning of the non-jury trial[5] and the application of the Sixth Amendment's counsel provision to the States.[6]

As early as 1827, the Supreme Court of Virginia recognized that even where there was only one unimpeached prosecution witness and no defense presentation "it is the right of every party to be heard by counsel on his whole case." Word v. Commonwealth, 30 Va. (3 Leigh) 743, 759 (1827). Other states readily followed suit, holding that the right to closing argument was protected by their individual constitutional provisions guaranteeing the right to counsel.[7] State v. Page, 21 Mo. 257 (1855); Lynch v. State, 9 Ind. 541 (1857);

5. Patton v. United States, 281 U.S. 276 (1930). While there were instances of jury-trial waivers prior to Patton, they were largely during colonial times, and by the end of the nineteenth century were common only in Maryland and West Virginia. See Singer v. United States, 380 U.S. 24 (1965); Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 491 (1947); Griswold, The Historical Development of Waiver of Jury Trial in Criminal Cases, 20 Va. L. Rev. 655 (1933-34).

6. Gideon v. Wainwright, 372 U.S. 335 (1963).

7. Most of these cases arose in the context of the trial court's improper limitation of counsel's closing argument.

Weaver v. State, 24 Ohio St. 584 (1874); Williams v. State, 60 Ga. 367 (1878); State v. Hoyt, 47 Conn. 518 (1880); Wingo v. State, 62 Miss. 311 (1884); Stewart v. Commonwealth, 117 Pa. 378, 11 A. 370 (1887); People v. Green, 99 Cal. 564, 34 P. 321 (1893); Seattle v. Erickson, 55 Wash. 675, 104 P. 1128 (1909); People v. McMullen, 300 Ill. 383, 133 N.E. 328 (1921); Sizemore v. Commonwealth, 240 Ky. 279, 42 S.W. 2d 328 (1931); Hall v. State, 119 Fla. 38, 160 So. 511 (1935); State v. Ballenger, 202 S.C. 155, 24 S.E. 175 (1943).[8] Indeed, even prior to this Court's decision in Gideon, the Supreme Courts of Oregon and Alabama considered closing argument to be encompassed by both the federal and state constitutional guarantees of counsel. State v. Rogoway, 45 Or. 601, 78 P. 987 (1904); Yeldell v. State, 100 Ala. 26, 14 So. 570 (1894).

Today, controversy exists only as to a defendant's right to a summation when he is tried without a jury. Since approximately forty percent of all felony trials are without a jury, [Kalven & Ziesel, THE AMERICAN JURY 16-26 (1966)], the significance of the issue presented here cannot be minimized.[9]

The decision below is also contrary to the weight of authority. In United States v. Walls, 443 F. 2d 1220 (6th Cir., 1971), the court held that preclusion of closing arguments in a non-jury trial deprived a defendant of the effective assistance of counsel. The same result was reached in Thomas v. District of Columbia, 90 F. 2d 424 (D.C. Cir., 1937), and in United States ex rel. Spears v. Johnson, 327 F. Supp. 1021 (E.D. Pa., 1971), rev'd. 463 F. 2d 1024

8. Indeed, treatises on trial conduct written during the last century are virtually unanimous in stating that the right to counsel encompasses the right to have counsel deliver a closing argument. See e.g. Hilliard, On New Trials §40 (2nd Ed. 1866); 1 Thompson, Trials §§921, 955 (1889); 2 Hyatt, Trials §1450 (1924); 5 Wharton's Criminal Law and Procedure §2077 (Anderson Ed. 1957).

9. Indeed, Indiana has recently proposed a statute derived from and virtually identical to the New York provision in issue here. Ind. Code Crim. Proc., Proposed Final Draft §35-6.1-7-1(c)(3)(September, 1972).

(3rd Cir., 1972).[10] Similarly, a majority of state courts faced with the issue, before and after Gideon, have held that the right of an accused to be heard on the evidence in a non-jury trial is guaranteed by the federal constitution. People v. Thomas, 390 Mich. 93, 210 N.W. 2d 776 (1973); Commonwealth v. Gambrell, 450 Pa. 290, 301 A. 2d 596 (1973); Yopps v. State, 228 Md. 204, 178 A. 2d 879 (1962); Olds v. Commonwealth, 10 Ky. (3 AK Marsh) 465 (1821).[11]

A number of courts, however, differ with the majority on this question. The Fifth Circuit, in a non-jury trial conducted pursuant to the Federal Juvenile Delinquency Act, has declined to recognize the right to present a closing argument. West v. United States, 339 F. 2d 467, 470 (5th Cir., 1968), cert. denied 393 U.S. 1102 (1969). Likewise, the Illinois Supreme Court has held that the decision to hear closing argument in a non-jury trial rests in the discretion of the trial court. People v. Manske, 399 Ill. 176, 77 N.E. 2d 164 (1948); People v. Berger, 284 Ill. 47, 119 N.E. 975 (1918). See also People v. Don Carlos, 47 Cal. App. 2d Supp. 863, 117 P. 2d 748 (1941); People v. Marcias, 130 Cal. App. 2d 860, 279 P. 2d 987 (1954). This divergence of authority warrants plenary review of the issue by this Court.

II.

Preclusion of a defendant's right to a summation in a non-jury trial seriously undermines the role of his counsel in arguing his case and thus dilutes his basic right to be heard. An appreciation

10. The court's reversal was based upon a finding that the trial court had not, in fact, prohibited counsel from presenting a summation.

11. Texas and Ohio, in pre-Gideon decisions, also confronted this issue and held that the right to a non-jury trial summation was guaranteed by their respective state constitutional rights to counsel. Walker v. State, 133 Tex. Crim. 300, 110 S.W. 2d 578 (1937); Ferguson v. State, 133 Tex. Crim. 250, 110 S.W. 2d 61 (1937); Anselin v. State, 72 Tex. Crim. 17, 160 S.W. 713 (1913); Decker v. State, 113 Ohio St. 512, 150 N.E. 74 (1925).

of the fact-finding process in a bench trial demonstrates that closing argument is as crucial to the presentation of a defense as it is in a jury trial. A judge does not differ from a jury in his ability to retain and to assemble material which has come before him during the days or possibly weeks of trial. Judicial training, while affecting legal expertise, does not afford improved ability to remember or to reconstruct facts accurately. The fallibility of the human mind afflicts judges as well as jurors.

Furthermore, a jury, by definition, makes a collective judgment and thereby tends to compensate for the shortcomings of individual jurors and generally assures a reliable decision. See Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 4 (1966). A judge, in contrast, comes to his decision unaided by the recollections or points of view of others. In the absence of summation by the respective parties, there is no in-put at all into his decision-making process to compensate for the possibility of a premature decision, to counterbalance any prejudice developed during trial,[12] or to alert him to possible error in his own recollection of the evidence.

The facts in this case underscore the importance of summation in the non-jury context. This was a trial which involved four witnesses, consisted of three days of testimony and extended over a five-day period. Not only did the defense attack the credibility of the complainant who admitted prior drug use and prior familiarity with appellant, but an alibi was also proferred in which appellant's

12. Even though the presumption abounds that judges sitting without a jury will decide cases on factual material properly before them, the cases in which this presumption is rebutted are too numerous to cite comprehensively. E.g. United States v. Vaughan, 443 F. 2d 92 (2d Cir., 1971); United States v. Hamrick, 293 F. 2d 468 (4th Cir., 1961); Maddox v. State, 235 N.E. 2d 475 (Ind., 1968); Corbett v. State, 4 Md. App. 269, 242 A. 2d 603 (1968); People v. Green, 21 Mich. App. 575, 175 N.W. 2d 521 (1970); People v. Harvey, 13 Mich. App. 211, 163 N.W. 2d 826 (1968). Indeed, even where a judge presiding over a jury trial becomes privy to information not properly before him which may potentially affect the manner in which he charges the jury, this Court has recognized the serious possibility of prejudice. Gregg v. United States, 394 U.S. 489, 492 (1969).

employer testified that at the time of the crime appellant was at work. The only rebuttal to the alibi was that the crime occurred within walking distance of appellant's place of employment and it was possible for him to have sneaked out to rob the complaining witness. Thus, before coming to its verdict, the court had considerable detail to weigh. Appellant was entitled to have the relevant and material features of the factual material adduced placed in perspective by his attorney and not to be left solely to the mercy of the judge's subjective and impenetrable view of the case delivered eight minutes later in the form of a guilty verdict.

In short, closing argument is basic to our adversary system of criminal justice. It is counsel's final and often sole opportunity to present his analysis of the evidence as a whole on his client's behalf. This essential right should not be abridged.

CONCLUSION

FOR THE ABOVE REASONS, THE QUESTION PRESENTED IS SUBSTANTIAL, MERITING REVIEW.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Counsel for Appellant

DIANA A. STEELE
Of Counsel
April, 1974

APPENDIX A

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 24, 1973.

PRESENT:

HON. JAMES D. HOPKINS, Acting Presiding Justice,
HON. FRED J. MUNDER
HON. M. HENRY MARTUSCELLO
HON. [illegible]
HON. FRANK A. GULOTTA
HON. ARTHUR D. BRENNAN
Associate Justices

The People of the State of New York,

Respondent,

v.

Clifford Herring,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Clifford Herring, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Richmond County, rendered June 15, 1972;

and the said appeal having been argued by Diana A. Steele, Esq., of counsel for the appellant, and argued by Norman C. Norco, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

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Clerk of the Appellate Division

APPENDIX-B DAS

APR 4 - 1974

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on **March 22, 1974.**

HON. FRANK A. GULOTTA, *Presiding Justice*
HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
HON. [redacted]
HON. [redacted]
HON. [redacted]
HON. [redacted]
HON. ARTHUR D. BRENNAN
HON. [redacted]
HON. FRED J. MUNDER
Associate Justices

The People, etc.,

Respondent,

v.

Order

Clifford Herring,

Appellant.

In the above entitled cause, the above named Clifford Herring, defendant, having appealed to this court from a judgment of The Supreme Court, Richmond County, rendered June 15, 1974; and this court, by order dated December 24, 1973, having unanimously affirmed the judgment; and the appellant having moved to amend the remittitur of December 24, 1973, so as to state therein that constitutional questions were presented, namely, whether he was deprived of his rights under the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States;

Now, upon the papers filed in support of the motion and there being no opposition thereto, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby granted to the following extent: decision and order of this court dated December 24, 1973 amended by adding thereto the following:

Upon the appeal herein, there was presented and passed upon the following constitutional question, namely, whether relator's rights under the Fourth, Sixth and Fourteenth Amendments were denied by the trial court's application of paragraph (c) of subdivision 3 of CPL 320.20 to refuse appellant permission to deliver a summation. This court considered appellant's said contention and determined that none of his constitutional rights were violated.

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IRVING N. SELKIN

Clerk of Appellate Division

State of New York
Court of Appeals

BEFORE: HON. HAROLD A. STEVENS, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

CLIFFORD HERRING

CERTIFICATE DENYING LEAVE

I, HAROLD A. STEVENS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
January 31, 1974

Harold A. Stevens
Associate Judge

*Description of Order: